



Testimony of
Theresa Papademetriou
Senior Legal Specialist
The Law Library of Congress

on
The European Union

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VISA OVERSTAYS: A GROWING PROBLEM FOR LAW ENFORCEMENT

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OVERSTAY OF VISA AND LAW ENFORCEMENT AUTHORITIES

Immigration issues, such as conditions of entry and residence, measures to counter illegal immigration and illegal residence, and issues related to border control fall within the competence of the European Union. On the other hand, matters related to maintaining law and order and safeguarding the internal security fall within the ambit of the Member States.

In order to secure the right of persons to move freely within the EU borders, the Council of the European Union, which is one of the primary institutions of the EU responsible for adopting legislation, has the power, based on the mandate by the Amsterdam Treaty, to adopt measures related to the free movement of persons within the Community borders along with “directly related flanking measures” on external border control, asylum and immigration, and measures to prevent crime. The flanking measures specifically relate to:

- rules on crossing the external borders including, establishing the standards and procedures that Member States must follow in carrying out checks on persons at such borders
- rules on visas for periods of no more than 3 months, including the list of countries whose nationals must be in possession of visas when crossing the borders
- measures establishing the conditions under which third country nationals may freely travel within the territory of the Member States for no more than 3 months.¹

The smuggling and trafficking of human beings have also been discussed in connection with illegal immigration. The EU has adopted two key legal instruments to address this issue: a framework decision adopted in July 2002 on combating trafficking of human beings and a pending proposal for a Council decision to conclude on behalf of the European Community of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons and Supplementing the United Nations Convention Against Transnational Organized Crime.²

Within the borders of the EU, there are a large number of illegal residents. The European Commission, another primary institution that has the right to initiate legislation and to supervise the correct implementation of EU legislation, has identified three possible groups, those who have: entered with a valid visa or residence permit but have overstayed; entered based on valid travel documents when their nationality has been exempted from a visa requirement for a short stay; and had proper residence and work permits and simply overstayed their period of legal residence. Eventually their residence becomes illegal. There is no assessment of the approximate number of illegal immigrants in each of the different groups.³

A legal framework for illegal immigration issues, such as the issuing of visas, border controls,

¹ Amsterdam Treaty, articles 61, 62 and 63.

² COM/2003/0512 final

³ Proposal for a Comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union OJ C 142/6/14/2002.

illegal entry and stay, and the trafficking of human beings is in force and is binding for all European Union Members, including the new Members. The Schengen Convention⁴ also contains a number of binding rules on illegal immigration and border control. Introduction of new rules are not warranted, since according to the European Commission's opinion, the existing framework suffices to deal with the issue of illegal immigration. The Commission has also often urged the Member States to implement the EU rules in this area, since successful combat against illegal immigrations presupposes correct and timely implementation and enforcement of the existing regime by the Member States.⁵

Illegal immigrants may go for a long period completely undetected within the borders of the European Community in the absence of an EU-wide system to track their whereabouts. However, the role of the Schengen Information System (SIS) must be stated in this respect as a useful tool in keeping records of those who violate the laws and regulations in a Member System and those who are considered a threat to national security and public policy. The SIS consists of a national function and a technical support function. Each Member is responsible for issuing alerts on aliens based on the information provided by the Schengen Agreement and inserting them in the database.

Currently, 13 Member States and two non-Member States (Norway and Iceland) participate in the SIS. However, the SIS is a system that was created initially with a small number of participant countries, and thus, its current capabilities are not sufficient to handle the increase in Member States after the EU enlargement. Based on the most current, available developments in information technology, the EU has introduced the concept of a second generation SIS and provided funds from the general EU budget to accomplish this task. Future EU Member States are required to use the system, so during the application process, applicants have to transpose the Schengen *acquis* into their domestic legislation.

The SIS is a hit/no hit system that allows the Member States to exchange information in order to supervise the free movement of persons and the maintenance of public security and to assist the Members in the fight against organized crime. In June 2003, the Justice and Home Affairs Council reiterated again that the functions of the SIS system must be expanded to include new categories of persons included, as well as additional authorities to get access to the system. Moreover, it was suggested that the storage, transfer, and possible querying of biometric data, especially photographs and fingerprints, be inserted in the system. An eventual link of the SIS system and the Visa Identification System (VIS) that is planned to be introduced will likely be a more effective tool of recording those aliens who pose a threat to security and justice.⁶

It should be emphasized that the EU's approach to combat illegal immigration focuses on tackling various aspects. In an effort to deal effectively with this issue, the EU has paid particular attention to combat the problem of illegal immigration at its roots. The EU plan comprises pre-frontiers measures, such as a common visa policy, border control policy and return policy for illegal immigrants. The latter issue is a matter that falls within the responsibility of the Member States. The Members have signed a number of re-admission agreements with third countries.

⁴ Convention implementing the Schengen Agreement of June 14, 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on June 9, 1990 OJ L 23/19 (9/22/2000).

⁵ *Supra* note 3.

⁶ Justice and Home Affairs Council Meeting, Luxembourg, 5-6 June 2003 (9845/03 (presse 150)).

The European Commission has paid considerable attention to the issue of illegal immigration, which has acquired new dimensions, especially since the events of September 11, 2001, in the US and the enlargement of the EU from the current fifteen Members to 25, as of May 1, 2004. Based on work previously prepared by the European Commission, a comprehensive plan was adopted in February 2002 to combat illegal immigration at the EU level.

The plan identified six areas where action is deemed necessary:

- visa policy
- infrastructure for information exchange, cooperation and coordination
- border management
- police cooperation
- criminal penalties for those who facilitate illegal immigration
- return and re-admission policy.

Visa Policy

The EU views a common visa policy as one of the key instruments to prevent illegal immigration. Illegal immigration along with other criteria such public policy and security concerns, external relations, and reciprocity were used in adopting the Regulations listing third-country nationals who must possess a visa when crossing the external borders and those whose nationals are exempt from that requirement. The list of countries was updated recently.⁷

The so-called Santiago Action Plan that comprises the recommendation of the European Councils of Laeken and Seville, along with the comprehensive plan to fight illegal immigration and trafficking of human beings, have paid particular attention to the establishment of common new information system. This is the Visa Information System. (VIS), which will complement the existing rules on visas and could be a major step in harmonizing the policies of the Members States on this issue. As envisaged, the VIS will operate as a common electronic online system which could complement the concept of security documents in order to create a dual identification process based on secured documents and a corresponding database. The database will include information on the visa applicant, along with a picture, and documents to be scanned and stored. The system will be used to prevent fraud, visa shopping, and contribute to internal security. The VIS comprises a Central Visa Information System (C_VIS) and a National Visa Information System (N_VIS). A feasibility study carried out by the Commission provides the technical and financial aspects of the this program. Three options have been reviewed that could be used as biometric identifiers: iris scanning, facial recognition and fingerprinting . The Commission recommended fingerprinting as the best identifier to be included in a database. The consular posts are going to be connected to the VIS system. Thus, in practice, when an individual visits a consular office outside the EU to be issued a visa, the consular office will enter the data in the system, especially when the visa is refused. Subsequently, if the same individual visits another consular office, based on the information retrieved from the database, the consular will also be able to refuse entry to this individual.⁸

⁷ Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents COM/2003/323 final.

⁸ *Id.*

This is still far from being implemented. Further development of the program will depend on a number of factors decided by the Council, such as choice of identifier to be stored and processed in the system. Other issues involve allocation of community funds and especially the burden on the national budgets to fund the national parts of the VIS system and especially training and equipping the consular posts abroad. The Commission has entered €10 million euros in the preliminary draft budget for 2004 to finance the initial phase of development of the VIS. Further development of the VIS system to cover the additional needs is estimated for the period 2004-2006 at close to €140 million euros.⁹

The Commission considered the option of integrating in the central part of the VIS the Schengen Information System II. The Commission also intends to present proposals of adding biometric to EU passports, along with a photograph in the visa and residence permit. It has also been suggested that this system could be supplemented by introducing a central register of aliens. No further progress could be found on this issue.

Gathering of Information, Intelligence, and Analysis

With regard to enhancing the cooperation and coordination of the Member States and law enforcement agencies, it was that a technical support facility be established in order to assist in information gathering, analysis, and dissemination. There are already a number of formal and informal networks such as the Center for Information Exchange (CIREFI) under which, on a monthly basis, Members exchange information on current trends in migratory flows. The Early Warning System which has been established since 1999 is used for the transmission of information on illegal migration and facilitator networks. However this is still at an embryonic stage. By the end of 2003, the Commission plans to introduce a proposal establishing an information and coordination network in conjunction with the early warning system. Moreover, the Commission is examining the creation of a European Migration Observatory which could monitor and carry out comparative analysis of both legal and irregular migratory flows.

Border Management

The external borders are still seen as the “weakest link” which can affect the internal security of the Members in particular in an area without borders. The Member States are responsible for conducting checks at border crossing points in accordance with the rules of the Schengen Convention so that persons, and vehicles are free to enter or leave the Schengen area.

The current rules on external borders are principally based on the Schengen Convention¹⁰ and Title IV of the Treaty on European Community. The Schengen Agreement, which was signed in 1985 by Germany, France, and the Benelux countries, has been incorporated into the founding EU Treaties. The participating states include: Austria, Belgium, Denmark, Finland, Germany, Greece, Spain, France, Italy, Luxemburg, the Netherlands, Portugal, and Sweden and non-EU members Iceland and Norway. Ireland and United Kingdom have opted out of certain provisions. Both exercise control on persons entering from other Member States. Member States are also allowed to exercise controls on persons entering their territory either from Ireland or the United Kingdom. An important feature of the Schengen Agreement is

⁹Id.

¹⁰Convention Implementing the Schengen Agreement of June 14, 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen on June 9, 1990, OJ L 23/19 (9/22/2000).

the lack of internal border controls among its members. In practical terms, this principle is expected to fully apply to everyone, regardless of nationality, as of May 1, 2004. At the external borders, EU citizens are requested to show ID cards or passports, while third country nationals enter by showing a valid visa or a passport.

Since March 26, 1995, checks and surveillance at the external borders are governed by certain uniform rules laid down in the Schengen Convention. Articles 7 and 47 of the Schengen Convention require that the Member States cooperate closely in the area of border controls. Two kinds of cooperation pertaining to checks and surveillance are currently followed by Member States: the exchange of liaison officers and bilateral police cooperation agreements between the Member States with the objective of fighting illegal immigration and organized crime.

Initial steps have been taken to facilitate the creation of a European border guard which will be entrusted to complement the actions of the Members in managing their external borders. A number of pilot projects have been initiated to enhance further cooperation between the border guard services of Member States. The Commission also intends to submit a proposal for the creation of a Border Management Agency based on the experience gained by the Common Unit of External Border Practitioners. This unit was created in June 2002. It is composed of the heads of border control services of the Members and Norway and Iceland to coordinate the measures related to border control.

Police Cooperation

Under the Schengen Agreement, police forces of the Members are required to provide mutual assistance and a direct information exchange between police services, cross-border surveillance, and pursuit of suspects. A European police force, Europol, has been established, and its role is to provide support to Member States in the prevention, investigation, and analysis of the crimes involved.¹¹ To this end, Europol operates and maintains a computerized database. Its mandate was expanded as of January 2002, to include additional forms of crime, such as organized crime and trafficking of human beings.

¹¹Europol Convention of July 26, 1995, on establishment of a European Police Office, OJ C316/2 (1/27/1995).